Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

KATHLEEN KAZANJIAN,

Petitioner,

vs.

ANNISTON CITY BOARD OF EDUCATION; DR. PAUL GOODWIN and CORNELL HOWARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under due process clause, does non-tenured Alabama public school teacher have a right to continued employment and due process rights where school board has adopted policies creating right to continued employment unless "valid reason" exists, and right to fair and impartial reviews, and said policies are enforceable under state law?

Under due process clause, are due process rights violated when teacher entitled to due process is terminated after second year and not rehired for third year without a hearing, based on accusation that she is a poor disciplinarian, when she was not given notice of accusation and her evaluations are good and do not reflect reason for termination?

Under the Civil Rights Act of 1991, is an implied cause of direct action of race discrimination against a state actor created under 42 U.S.C. § 1981?

Under 42 U.S.C. § 1981, is the "reasonable inference test" the standard for what constitutes a *prima facie* case of reverse race discrimination? Are the "background circumstances" supporting the suspicion that the Defendant is the unusual employer who discriminates against the majority a consideration in defining a *prima facie* case? Must a white employee be replaced by a minority employee to present a *prima facie* case, or is such fact a consideration in determining whether a *prima facie* case is presented?

Under Rule 4 of F.R.A.P. and Rules 54 and 58 of F.R.C.P., does Appellant give timely notice of appeal of summary judgment order, which Judge made final, when judge failed to give any reason for making judgment final, when there was no danger of hardship or injustice through delay, and when Appellant gives timely notice of appeal of final judgment?

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Petitioner Kathleen Kazanjian respectfully petitions for a writ of certiorari to review a "no opinion" judgment of the Eleventh Circuit Court of Appeals which affirmed District Court's grant of summary judgment to Board of Education on reverse race discrimination under 42 U.S.C. § 1981 and affirmed denial of teacher's motion for directed verdict on procedural due process claim.

OPINIONS BELOW

The District Court opinion and the opinion of the Eleventh Circuit Court of Appeals are unreported.

JURISDICTIONAL STATEMENT

The case to be reviewed is the "no opinion" decision of *Kazanjian v. Anniston City Board of Education, et al.*, issued 3/20/98 (App. A). Petition for rehearing and suggestion *en banc* was denied (dated 7/1/98) (App. B). The District Court summary judgment memorandum opinion is Appendix C. The District Court's summary judgment (dated 8/12/96) is Appendix D. Final judgment after a jury trial was entered 3/21/97, which included a Rule 50 denial (App. E). The District Court denied a motion for judgment NOV (motion dated 3/28/97, denial dated 4/1/97). Timely appeal was filed from denial of motion for judgment NOV.

This Court has authority for this review under 28 U.S.C. § 1254(1) and Rule 10.1(c), Rules of the Supreme Court.

STATUTES INVOLVED

ALA. CODE § 16-24-2 (1975)

§ 16-24-2. Criteria for continuing service status for teachers, principals and supervisors; list of persons recommended for continuing status; effect of consolidation or separation of schools.

(a) Any teacher in the public schools who shall meet the following requirements shall attain continuing service status: Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive school years and shall thereafter be reemployed in such county or city school system the succeeding school year.

ALA. CODE § 16-24-12 (1975)

§ 16-24-12. Teacher deemed reemployed for succeeding school year unless notified.

Any teacher in the public schools, **whether in continuing service status or not**, shall be deemed offered reemployment for the succeeding school year at the same salary unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; and such teacher shall be presumed to have accepted such employment unless he or she shall notify the employing board of education in writing to the contrary on or before the fifteenth day of June. The employing board of education shall not cancel the

contract of any teacher in continuing service status, nor cause notice of nonemployment to be given to any teacher whether in continuing service status or not except by a vote of a majority of its members evidenced by the minute entries of said board made prior to or at the time of any such action.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and **impairment under color of State law.**

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Kathleen Kazanjian, a white teacher with 20 years' experience, was hired as a 5th grade teacher by the Anniston City Board of Education.[1] (App. C-2).

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1. Under ALA. CODE § 16-24-12 (1975), tenured and non-tenured Alabama teachers are automatically hired the succeeding year unless the board of education gives written notice prior to the last day of school.

Non-tenured probationary teachers with the Anniston Board of Education have job security (Plaintiff's Exhibit 60; Appendix G) in that they may be dismissed only upon written recommendations of the superintendent of schools if a ***valid reason for dismissal*** exists. (See Appendix F for policy GBG — Probation of Professional Personnel) Also, the Anniston City Board of Education has adopted policies giving non-tenured teachers a right to review and sign evaluations, to submit a response to the evaluations, and to appeal the evaluations utilizing another impartial evaluator. (*See* Appendix G for policy GBI — Evaluation of Professional Personnel).

Prior to the end of the first year, Mrs. Kazanjian and all other non-tenured teachers were given notice that their contracts would not be renewed for the next year for the "valid reason" of "lack of funding" (R-Excerpts 47-3; Plaintiff's Ex. 7). After funding was approved by the state legislature, Kathleen Kazanjian and the other non-tenured teachers were rehired by the Anniston City Board of Education. Mrs. Kazanjian was assigned to Randolph Park Elementary School (R-Excerpts 47-3).

During the second year, Cornell Howard, Appellant's principal, who is black, responded to a request by Paul Goodwin, the superintendent who is black, that Kathleen Kazanjian should not be rehired the next year (R-Excerpts 47-3), with these words:

> Initiates but does not preserve classroom management and discipline. Does not encourage student participation in school sponsored activities and/or events. Students respond negatively to the teacher. (Plaintiff's Ex. 9; App. C-2).

Mr. Howard never showed Kazanjian these accusations (App. C-2).

At the time Kazanjian's contract was not renewed, the Board had in place a policy regarding the evaluation of non-tenured teachers. Pursuant to this policy, Kazanjian had been observed and evaluated by supervisory personnel several times while at Randolph Park. For every evaluation that was prepared before she was terminated, Kazanjian was given the opportunity to review and object to her evaluations. Kazanjian signed all of these evaluations without objection. At Goodwin's request, Howard prepared during the summer of 1994 and post-dated to April 29, 1994, one final evaluation of Kazanjian that reflected Howard's recommendation to Goodwin that Kazanjian not be

rehired. Kazanjian was no longer employed by the Board when this evaluation was prepared and was not given the opportunity to review or sign this last evaluation. (App. C-3).

Based on the principal's negative evaluations and comments, the superintendent requested the Board of Education to terminate Mrs. Kazanjian and 13 other non-tenured teachers (Ex. 13; R-Excerpts 47-3; App. C-3). The Board notified Kazanjian that her contract would not be renewed (App. C-3).

At the conclusion of Kazanjian's second year, all non-tenured teachers were retained except for Mrs. Kazanjian and five others on the termination list (R-580; App. C-10). Non-tenured teachers who were not terminated prior to the end of the school year were automatically hired the next year in accordance with ALA. CODE § 16-24-12 (1975), the automatic rehire statute.

On 5/6/94, Mrs. Kazanjian received written notice that she was not being rehired the next year (App. C-3). The reason for said decision was not given (Plaintiff's Ex. 15).

On 6/6/94, Mrs. Kazanjian wrote the superintendent expressing a desire to be rehired a third year. She received no response (R-100). On 7/27/94, Mrs. Kazanjian personally met with the superintendent and the principal. Neither would say why she had been terminated and not rehired (R-100-101).

On 8/12/94, Kathleen Kazanjian's attorney wrote the superintendent and stated that Mrs. Kazanjian appeared to be a victim of age or reverse race discrimination. The attorney asked that Mrs. Kazanjian be hired (R3-23-Plaintiff's Ex. 17).

On 8/15/94, **one day after the letter was received**, the superintendent appointed Sara Earline Lee, a white female non-

tenured teacher, age 34, with no prior service with Defendant, to fill Mrs. Kazanjian's vacant teacher's position (R3-23-Ex. 5). The principal who recommended dismissal of Kazanjian had recommended a **young black male** teacher named Cornelius Cross to be Mrs. Kazanjian's replacement (R3-23-Tab D-119-120).

On 8/16/94, the superintendent responded to the attorney's letter and he refused to state a reason why Plaintiff was given notice of termination and not rehired (R3-23-Plaintiff's Ex. 18).

Kazanjian's formal evaluations which were shown to her were positive and stated no reason for termination (Plaintiff's Exs. 10, 11). If Kazanjian had been shown a negative evaluation, she would have asked for an independent evaluator to evaluate her (R-82) as provided by the Board's Rules and Regulations (Plaintiff's Ex. 60; App. G).

During the year at Randolph Park, Plaintiff witnessed numerous examples of race discrimination by Mr. Howard which she documented in her opposition to summary judgment, including: (1) Mr. Howard treated Kazanjian differently than other fourth grade teacher who was black; (2) elimination of programs with white representatives; (3) statement by Mr. Howard to Mrs. Kazanjian ("You're not part of this community."); (4) Kazanjian was referred to as the "white Mrs. K" by black teacher in the presence of the principal; and (5) Mr. Howard supported a surrogate mother of a child who complained that child was doing poorly due to having a white teacher (Kazanjian) (R3-23-Tab B). In 1995 after the black principal resigned, there was strong community and parental reaction against the decision to hire a white principal at Randolph Park (R3-23-Ex. 79; R3-23-Tab F-41; R3-23-Tab C-105-108).

Dr. Paul Goodwin, the Superintendent of the Anniston City Board of Education, and Cornell Howard, the Principal of Randolph Park, are black. The Anniston City School System students are predominantly black with 85% black and 15% white (R3-23-Tab C-33-34). Most of the employees at the Administrative Office of the Board of Education are black (R3-23-Tab B-2). All the students at Randolph Park are black (R3-23-Tab E-24-28). Eight (8) of the teachers at Randolph Park were black and six (6) were white (R3-23-Tab B-2). Kazanjian was the only teacher without tenure at Randolph Park (App. C-2).

If a teacher is retained three years by the Board of Education, the teacher obtains tenure on beginning the fourth year (ALA. CODE § 16-24-2a (1975)). Even though Kazanjian was replaced with a white teacher, the action of the principal and the Board prevented Kazanjian, a white teacher, from obtaining tenure, and lessened the possibility that any white teacher would obtain tenure at Randolph Park.

REASONS FOR GRANTING THE WRIT

I.

DECISION CONFLICTS WITH PROCEDURAL DUE PROCESS CLAUSE

The writ should be granted because the "NO OPINION" decision conflicts with the due process clause of the Constitution and with the Supreme Court cases of *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 548 (1972); and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), which guarantee public non-tenured teachers procedural

due process *if* a property right in continued employment is created by state law, or *if* a person's good name, reputation, honor or integrity is at stake because of what the government is doing. Petitioner is entitled to the protection of *Roth* and *Loudermill* because she had an expectation of continued employment under applicable Board policies which provided for continuation of employment except for "valid reason" and which are enforceable under *Belcher v. Jefferson County Board of Education*, 474 So. 2d 1063 (Ala. 1985), which held that a board of education is bound to comply with its adopted rules. Petitioner is also entitled to protection under *Roth* because the termination and refusal to rehire had a stigmatizing effect on future employment opportunities in that she was allegedly terminated for being a poor disciplinarian. Kazanjian was entitled to directed verdict on procedural due process issue.

II.

CIVIL RIGHTS ACT OF 1991 CREATES IMPLIED CAUSE OF ACTION AGAINST STATE ACTOR

The writ should also be granted because the Eleventh Circuit "NO OPINION" decision conflicts with the Civil Rights Act of 1991 and with the Ninth Circuit decision of *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (C.A. 9 (Cal.) 1996), which held that the Civil Rights Act of 1991 creates an implied cause of direct action of racial discrimination against state actors because said act amended 42 U.S.C. § 1981 with the following language:

> (c) **Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernment discrimination and impairment under *color of State law.*

The District Court granted summary judgment to the school board, holding that 42 U.S.C. § 1983 is the exclusive means for recovery for such claims, and § 1983 precludes recovery under 42 U.S.C. § 1981. The Court cited *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731 (1989). The *Jett* decision has been overridden by Congress with the Civil Rights Act of 1991 as cited above. Petitioner's claim against the Board of Education was a direct claim against the Board based on its decision to terminate and not rehire. Petitioner's claim is not based on a *respondeat superior* theory due to action of an employee.

III.

PRIMA FACIE CASE OF REVERSE RACE DISCRIMINATION; REASONABLE INFERENCE TEST; BACKGROUND CIRCUMSTANCES OF DEFENDANT; REPLACEMENT BY SOMEONE OUTSIDE CLASS

The petition should also be granted because the Eleventh Circuit, in affirming the District Court, in effect held that a *prima facie* reverse race discrimination claim can never be shown if a white employee is replaced by a white employee. The decision conflicts with the "circumstances which give rise to an inference of unlawful discrimination" standard as defined in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 212 (1981).

The Tenth Circuit has specifically adopted the "reasonable inference" to a reverse discrimination claim in *Notari v. Denver Water Dept.*, 971 F.2d 585 at 599 (C.A. 10 1992):

> [T]he plaintiff must allege and produce evidence to support specific facts that are sufficient to support a **reasonable inference** that but for plaintiff's status the challenged decision would not have occurred. 971 F.2d at 599.

The decision conflicts with those circuits which have held that the "background circumstances" supporting "the suspicion that the defendant is that unusual employer who discriminates against the majority" as utilized in the District of Columbia Circuit and the Sixth and Eighth Circuits.

The decision also conflicts with the United States Supreme Court and three circuits by requiring replacement by a black teacher in order to show a *prima facie* case.

In *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433, the Supreme Court held the fact that ADEA plaintiff was replaced by someone outside protected class is not a proper element of *McDonnell Douglas prima facie* case. Five federal circuits have concluded that in order to satisfy the *McDonnell Douglas prima facie* case in a discharge setting, a plaintiff is **not** required to show that he was replaced by someone outside of plaintiff's protected class.

ARGUMENT

PROCEDURAL DUE PROCESS

Under due process clause and *Cleveland Board of Education, supra*, a non-tenured public teacher has a right to continued employment and due process where the school board has adopted policies which provide that non-tenured teacher may be dismissed for a **valid reason for dismissal** and which provide for an **evaluation process** whereby teacher will be shown evaluation, may respond to evaluation and request independent evaluation if dissatisfied, and where said policies are enforceable. A non-tenured teacher is also entitled to due process if the state action has a stigmatizing effect on future employment opportunities. *Board of Regents of State Colleges v. Roth, supra.*

Non-tenured teachers do have due process rights if the non-tenured teacher has a right to continued employment under state law.

> Respondents' federal constitutional claim depends on their having had a property right in continued employment . . .
>
> If they did, the State could not deprive them of this property without due process . . .
>
> Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."
>
> . . . the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.
>
> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."
>
> . . . . .
>
> We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."
>
> . . . . .

> This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.
>
> . . . **the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success**. *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1053, 55 L. Ed. 2d 252 (1978). [Emphasis supplied.]
>
> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1491, 1493-1495 (1985).

A. Plaintiff Had A Property Right In Continued Employment.

In 1985, the Alabama Supreme Court issued *Belcher v. Jefferson County Board of Education*, 474 So. 2d 1063, 1068 (Ala. 1985), wherein the Court reaffirmed the principle that a board of education is bound to comply with its adopted policies.

> Although *Walker County* did not directly address a teacher's suit to enforce such Board policies, it clearly states that a board of education is bound to comply with its adopted policies.
>
> . . . . .

> In the present case, the Board of Education did not legally have to follow any particular evaluation policy absent its own self-imposed procedures. Having adopted a policy, however, the Board is bound to follow it. *Walker County, supra.*

In *Belcher*, the Alabama Supreme Court allowed a non-tenured teacher to sue the Jefferson County Board of Education in contract because the Board of Education failed to comply with its own policies and procedures.

The *Belcher* case established the basis for **non-tenured public teachers to claim a property right in continued employment** based on policies and procedures of the Board of Education.

In 1985, the U.S. Supreme Court acknowledged that property rights are created under state law. The Court further held that if a property right exists, it cannot be deprived without due process.

> Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."
>
> . . . . .
>
> If they did, the State could not deprive them of this property without due process.

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985).

Therefore, when a board of education enacts policies and procedures protecting future employment, a non-tenured teacher has a property right in continued employment which cannot be deprived without procedural due process. The *Belcher* decision did not recognize a due process claim because the Supreme Court case of *Cleveland Board of Education* was not considered in the *Belcher* decision.

BASIS OF PROPERTY RIGHT

In the case at hand, the Anniston City Board of Education adopted the following policy which states that a probationary (non-tenured) teacher can be dismissed only for a "valid reason" for dismissal:

> PROBATION OF PROFESSIONAL PERSONNEL
>
> In accordance with the Alabama School Code, all professional personnel eligible for tenure shall be considered as *on probationary status* until continuing service status (tenure) is attained. Continuing service status is attained when a person serves in the School District for three (3) consecutive school years and is re-employed for the succeeding school year.
>
> During the probationary period, professional personnel may be dismissed by the Board at any time, upon written recommendation of the Superintendent of Schools *and a valid reason for dismissal*. If professional personnel are not notified, in writing, by the Board at the expiration of the probationary period that he has been discharged, said personnel shall automatically gain continuing service status.

(Emphasis supplied; Appendix F).

The Board also adopted the following policy which provided for evaluations in a uniform and honest manner, with the right to review evaluations and the right to request an independent evaluator:

EVALUATION OF
PROFESSIONAL PERSONNEL

The evaluation of professional personnel shall be the responsibility of said employee's immediate supervisor and appropriate supportive personnel. The evaluation of an employee's effectiveness, especially teaching personnel, is a difficult task and subjective in nature. However, the effectiveness of the total instructional program of the School District is dependent upon effective and competent professional personnel. Evaluation of professional personnel should be carried out by the School District in a systematic, *uniform and honest manner.* In order to insure and promote the welfare of professional personnel, the evaluation of said personnel shall always encompass the provisions that follow:

1. Evaluation for re-employment purposes shall be completed after not less than three classroom or work area visitations and conference by the evaluator.

2. The evaluator shall reduce the findings of each visitation to writing and submit to the employee at a conference scheduled not less than five (5) days following each visitation. Said personnel shall always retain the *right to disagree with the*

evaluation. In such cases, said personnel shall *request the Superintendent of Schools to appoint an evaluator in addition to said employee's immediate supervisor.*

3. When, in the opinion of the evaluator the employee *needs to improve certain skills required in his work, the evaluator and employee should cooperatively develop a plan through which such skills might be acquired.*

4. Every effort should be made by the School District to provide meaningful in-service opportunities for said personnel. Instructional specialists and consultants should be made available to work with employees needing and desiring their services. *Evaluators should make every effort to help professional personnel to grow professionally* and to become a competent and contributing member of the School District's professional staff.

5. However, *when all attempts to help* professional employees grow professionally *have failed* the best interest of the School District and the well-being of the students must be considered.

[Emphasis supplied; Appendix G]

VIOLATION OF DUE PROCESS RIGHTS

The Anniston City Board of Education claims to have terminated Kazanjian because she was a poor disciplinarian.

The school board deprived Kazanjian of her property right in continued employment without any due process because: (1) Kazanjian was never informed of these evaluations until after she was terminated; (2) Kazanjian was never informed of the reason why she was terminated; and (3) the reasons for termination never appeared on any evaluation given to Kazanjian.

Based on the Board's policies which include dismissal only for "valid reason", and the *Belcher* decision which holds that the Board's policies are enforceable, Appellant had a property right in continued employment which cannot be deprived without procedural due process.

The procedural due process rights of Alabama non-tenured public school teacher entitled to due process are violated when teacher is terminated for cause, i.e., "being a poor disciplinarian", when she was not told the reason for her dismissal, she was not given a hearing, and she received no evaluation regarding being a poor disciplinarian.

REVERSE RACE DISCRIMINATION

A. Implied Cause of Action Against State Actors

Even though the Civil Rights Act of 1991 clearly creates an implied cause of action against state actors under 42 U.S.C. § 1981, the circuits remain divided on the issue.

The District Court ruled that a claim for race discrimination is barred by *Jett v. Dallas Indep. School District*, 109 S. Ct. 2702 (1989), wherein the Supreme Court held that 42 U.S.C. 1983 is the exclusive means by which a Plaintiff can pursue damages for a 42 U.S.C. § 1981 violation against a state actor.

Subsequent to *Jett*, the Civil Rights Act of 1991 was enacted which amended 42 U.S.C. § 1981 with the following language:

> (c) **Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernment discrimination and impairment under *color of State law.*

The Ninth Circuit specifically ruled in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (CA 9 (Cal.) 1996), that the Civil Rights Act of 1991 overturned the ruling in *Jett*:

> Based on our consideration of the aforementioned factors, we conclude that the amended 42 U.S.C. § 1981 contains an implied cause of action against state actors, thereby overturning Jett's holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. § 1981.

In contrast, the Courts of Appeals for the Fourth and Eleventh Circuits have held that Section 1983 continues as the exclusive federal remedy for rights guaranteed in Section 1981 by state actors. *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995); *Johnson v. City of Fort Lauderdale*, 903 F. Supp. 1520 (S.D. Fla. 1995), *aff'd*, 114 F.3d 1089 (11th Cir. 1997).

The Supreme Court has not specifically declared whether the Civil Rights Act of 1991 gave Plaintiff a direct cause of action against a board of education (a state actor) on her claim

of race discrimination. Petitioner humbly prays that the Court will take this opportunity to affirm that the Civil Rights Act of 1991 allows a § 1981 action against a state actor.

PRIMA FACIE CASE

A. Reasonable Inference Standard

In the case of employment discrimination, where a member of a racial minority alleges racial discrimination, the Supreme Court requires the plaintiff to make a prima facie case by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 688 (1973).

The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 212 (1981).

The Supreme Court has not stated what constitutes a *prima facie* case in a reverse discrimination case. There is a dispute among the circuits as to what constitutes a *prima facie* case of reverse discrimination. The Fourth Circuit in *Notari v. Denver Water Dept.*, 971 F.2d 585, 599 (10 C.A. 1992), and with language similar to *Burdine*, *supra*, has adopted the reasonable inference test:

> [T]he plaintiff must allege and produce evidence to support specific facts that are sufficient to support a **reasonable inference** that but for plaintiff's status the challenged decision would not have occurred.

B. Background Circumstances of Employer

In *Parker v. Baltimore & Ohio Railroad*, 625 F.2d 1012 (D.C. Cir. 1981), the District of Columbia Circuit required a majority plaintiff claiming reverse discrimination to allege and show "background circumstances" supporting "the suspicion that the defendant is that unusual employer who discriminates against the majority." The "background circumstances" test was further defined in *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993):

> The "background circumstances" requirement is not an additional hurdle for white plaintiffs. On the contrary, it is a faithful transposition of the McDonnell Douglas/Burdine test for ordinary race discrimination cases into the reverse discrimination context. As such, it ensure that white plaintiffs have the same rights as minority plaintiffs. For both, Title VII requires that they state a prima facie case, consisting of facts and circumstances sufficient to raise an inference of discrimination.

The Sixth Circuit[2] and the Eighth Circuit[3] have held that "background circumstances" supporting an inference of discrimination are necessary to establish a *prima facie* case of

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2. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

3. *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992).

reverse race discrimination. The Fifth Circuit[4] has refused to require "background circumstances".

The Eleventh Circuit, without considering background circumstances, in *Shealy v. Town of Albany*, 89 F.3d 804, 805 (11 C.A. 1996), has adopted a strict *McDonnell Douglas* standard for establishing a *prima facie* case in a reverse discrimination case:

> In reverse discrimination suits, plaintiffs must establish a McDonnell Douglas prima facie case. Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991). The test requires a reverse discrimination plaintiff to prove:
>
> (1) that he belongs to a class;
>
> (2) that he applied for and was qualified for a job;
>
> (3) that he was rejected for the job; and
>
> **(4) that the job was filled by a minority group member or a woman.**

C. Replacement By Someone Outside Class

The District Court, following the Eleventh Circuit, ruled that Plaintiff did not present a *prima facie* case because she was not replaced by someone outside her protected class or a black teacher under similar circumstances did not receive the same action:

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4. *Young v. City of Houston*, 906 F.2d 177 (5th Cir. 1990).

> Assuming, *arguendo*, that Kazanjian was timely with her EEO charge of race discrimination, she has otherwise failed to meet her *prima facie* case of Title VII discrimination. Of the four elements from *McDonnell Douglas* set out above, the Board correctly argues that Kazanjian has failed to submit evidence either that she was replaced with someone outside of her protected class or that a black teacher in the Board system under similar circumstances did not receive the same adverse employment action.
>
> The evidence submitted by the parties clearly shows that Kazanjian was replaced by Lee, a white female. Although not precisely similarly situated, Annye R. Donald, a black tenured teacher, was also recommended for non-renewal by Howard in the same form recommendation with Kazanjian. Also, twelve non-tenured teachers in addition to Kazanjian were recommended to the Board for non-renewal by Goodwin at the end of the 1993-94 school year. Of those twelve, Barbara Baker and William Kennedy are black. Baker was among the six of these twelve who, including Kazanjian, were ultimately not renewed by the Board.
>
> Being unable to show that she received disparate treatment on account of her race, Kazanjian has failed to make out a *prima facie* case of race discrimination under Title VII.

(Appendix C-10).

In an age discrimination claim, the Supreme Court has held that it is not necessary to show that one was replaced by someone outside the protected class. *O'Connor*, *supra*. Five

federal circuits have concluded that in order to satisfy the *McDonnell Douglas prima facie* case in a discharge setting, a plaintiff is not required to show that he was replaced by someone outside of plaintiff's protected class. *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986); *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir. 1985). Three circuits state that plaintiff's replacement be outside of plaintiff's protected class as an element of a *prima facie* case; however, these courts do not strictly apply the replacement requirement, and failure to satisfy the replacement requirement does not defeat plaintiff's *prima facie* case. *Suggs v. ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228, 1232 (6th Cir. 1996); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984); *Marks v. Prattco, Inc.*, 607 F.2d 1153, 1155 (5th Cir. 1979). The Fifth Circuit has a split of authority within the circuit. In *Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir. 1995), the Fifth Circuit upheld the dismissal of plaintiff's claim for failure to show that his replacement was outside his protected class. In *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624, n.7 (5th Cir. 1997), the Fifth Circuit stated that *Singh v. Shoney's* does not represent controlling authority.

Petitioner presented sufficient facts to support a reasonable inference that she would not have been terminated and would have been rehired except for her race. In addition, Plaintiff showed the background circumstances supporting "the suspicion that the defendant is the unusual employer who discriminates against the majority." Under the facts of this case, the fact that Kazanjian was replaced by a white teacher should not preclude a *prima facie* showing.

D. Ineffective Certification For Immediate Appeal

District Court's certification for immediate appeal on summary judgment on reverse race discrimination claim is not final judgment for appeal purposes where court made no findings of fact as to finality and there was no danger of hardship or injustice through delay that would be alleviated by immediate appeal. FRCP 54(b); *Curtis Wright Corporation v. General Electric Co.*, 100 S. Ct. 1460 (1980); *Southeast Banking Corp. v. Bassett*, 69 F.3d 1539, 1547 n.2 (11th Cir. 1995); *Burlington Northern R.R. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985); and *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-10 (11th Cir. 1990).

CONCLUSION

WHEREFORE, Petitioner submits that the petition should be granted because Petitioner was entitled to a directed verdict on her procedural due process claim because she was entitled to due process and received no notice or hearing regarding her termination. Furthermore, summary judgment on reverse race discrimination should not have been granted because, after the Civil Rights Act of 1991, 42 U.S.C. § 1981 created an implied cause of action against state actors for race discrimination. Plaintiff presented a *prima facie* claim of reverse race discrimination in that, based on the facts presented by Plaintiff, an ordinary person could reasonably infer racial discrimination, especially since the background circumstances show that the Board was the unusual employer who discriminates against the employee. The lower court incorrectly held that Plaintiff had to be replaced by someone outside the protected class to show a *prima facie* case.

Respectfully submitted,

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